

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA**

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|---------------------------|---|----------------------|
| United States of America, |) | |
| |) | |
| Plaintiff, |) | ORDER |
| |) | |
| vs. |) | |
| |) | Case No. 1:18-cr-130 |
| Curtis McGarvey, |) | |
| |) | |
| Defendant. |) | |

On March 2, 2020, the Court entered an order denying the Defendant’s “Motion for Evidentiary Pursuant to *Rayl*.” See Doc. No. 49. Rather than hold an evidentiary hearing, the Court directed the Government to submit the material it expects to offer at trial to the Court for an *in camera* lasciviousness determination. The Court has now reviewed that material.

“Sexually explicit conduct” is defined as the “lascivious exhibition of the genitals or pubic area of any person.” 18 U.S.C. § 2256(2)(A)(v). The meaning of the phrase “lascivious exhibition of the genitals or pubic area” is a matter of law, however nudity alone is insufficient. United States v. Horn, 187 F.3d 781, 789 (8th Cir. 1999). The Eighth Circuit has adopted the *Dost* factors to aid and assist in determining whether images are “lascivious”. See United States v. Johnson, 639 F.3d 433, 439 (8th Cir. 2011) (citing United States v. Dost, 636 F. Supp. 828 (S.D. Cal. 1986)). The *Dost* factors are as follows: (1) whether the focal point of the picture is on the minor's genitals or pubic area; (2) whether the setting of the picture is sexually suggestive; (3) whether the minor is depicted in unnatural poses or inappropriate attire considering the minor's age; (4) whether the minor is fully or partially clothed or is nude; (5) whether the picture suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the image is intended to elicit a sexual response in the

viewer. Id.

The Court has fully reviewed the material submitted by the Government. The Court finds, as a matter of law, that the photographs and videos submitted satisfy the *Dost* factors as the material involves the “lascivious exhibition of the genitals or pubic area of any person” as defined by 18 U.S.C. § 2256(2)(A)(v). The Court further finds the images are relevant to the charged offense conduct.

IT IS SO ORDERED.

Dated this 3rd day of March, 2020.

/s/ Daniel L. Hovland
Daniel L. Hovland, District Judge
United States District Court